Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1979

NO. 79-1835

MORGAN ALEXANDER ROBERTS,

Petitioner

VS.

CAROLYN DENISE RANDALL,
UNITED STATES CIRCUIT JUDGE
FOR THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AND

W. J. ESTELLE, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS

Respondent

MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR COMMON LAW WRIT OF CERTIORARI OR FOR WRIT OF MANDAMUS TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BOB KUHN
Kuhn & Collins
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507 W. Tenth Street
Austin, TX 78701
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ATTORNEY FOR
PETITIONER

IN THE SUPREME COURT OF THE

UNITED STATES

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MOTION FOR LEAVE TO FILE PETITION FOR COMMON LAW WRIT OF CERTIORARI OR FOR WRIT OF MANDAMUS TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Morgan Alexander Roberts, Petitioner herein, by Bob Kuhn, his attorney, moves this Court as follows:

1. For leave to file the petition, hereto annexed, for common law writ of certiorari or writ of mandamus.

2. Upon granting such leave, to issue a common law writ of certiorari or writ of mandamus to the United States Court of Appeals for the Fifth Circuit, in accordance with the prayer of said petition.

DATED the _____ day of _____, 1980.

BOB KUHN
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A Professional Corp.
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ATTORNEY FOR
PETITIONER

IN THE SUPREME COURT OF THE

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Respondent

PETITION FOR COMMON LAW WRIT OF CERTIORARI OR FOR WRIT OF MANDAMUS TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Morgan Alexander Roberts, Petitioner herein, by Bob Kuhn, his attorney, petitions this Court to issue a common law writ of certiorari or writ of mandamus to Respondent Court of Appeals, and shows as follows:

I. JURISDICTION

Jurisdiction to grant the common law writ of certiorari or writ of mandamus to Respondent Court of Appeals, sought by petitioner herein, is conferred on this Court by the provisions of Section 1651(a), Title 28, United States Code, Rule 30 of the Rules of this Court.

II. QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to issue a common law writ of certiorari or writ of mandamus, directed to the Court of Appeals, on the basis that it has abused its discretion in declining to allow an appeal from the judgment of the District Court.

2. Whether the Court of Appeals abused its discretion in declining to allow an appeal from the judgment of the District Court denying petitioner's petition for writ of habeas corpus, and refusing to issue a certificate of

probable cause.

3. Whether this Court should exercise its discretion to issue a common law writ of certiorari or writ of mandamus to the Court of Appeals.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. CONSTITUTIONAL PROVISIONS

1. Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Amendment 14 (providing in pertinent part):

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATUTES

1. Section 2253, Title 28, United States Code:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a

habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

2. Section 1651(a), Title 28, United States Code:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

IV. STATEMENT OF THE CASE

1. This petition is filed pursuant to the authority to issue extraordinary writs vested in this Court by the provisions of Section 1651(a), Title 28,

United States Code, and Rule 30 of the Rules of this Court, to review the order of the United States Court of Appeals for the Fifth Circuit, declining to allow an appeal from the judgment of the District Court entered on March 30, 1979, denying petitioner's application for writ of habeas corpus.

2. Copies of the District Court's judgment and the Court of Appeals' order are set forth in Appendix B of this petition.

3. There are also included in the Appendix hereto which are essential to an understanding of the instant petition.

4. The substantive allegations of Petitioner are as follows:

a. Petitioner charges that his conviction is based on a coerced

and involuntary confession wrongfully admitted in evidence at his trial before a jury.

b. Petitioner alleges that during the course of the custodial interrogation from which was produced petitioner's signed confession, he was twice expressly denied his right to have counsel present. Furthermore, the State made no showing that petitioner knowingly and intelligently waived his right to have counsel present during the course of the said interrogation.

c. Petitioner further alleges that the warnings appearing at the top of the statements signed by him are ineffective to waive his right to counsel in that petitioner twice affirmatively requested the presence of counsel, and these requests were ignored or denied. Such denial of

petitioner's rights tainted any continued questioning of petitioner, and such continued questioning amounted to undue and purposeful coercion. Furthermore, without assistance of counsel, petitioner signed the aforementioned statements with the reasonable understanding that his agreement to sign was made in consideration for the release of his wife from police custody without being booked into jail under any charge, and such release did in fact transpire subsequent to petitioner's signing.

V. REASONS RELIED ON FOR ALLOWANCE OF WRITS

1. The relief herein sought is available, and there is an adequate remedy, by way of appeal to the Court of Appeals for the Fifth Circuit, and writ of certiorari to th Court. However,

the Court of Appeals has dismissed petitioner's appeal, claiming that it has discretionary power to do so. Petitioner, therefore, has no recourse to obtain review of the District Court's judgment herein other than by application for common law writ of certiorari to this Court, or for issuance by this Court of a writ of mandamus to the Court of Appeals to entertain petitioner's appeal and, in the event of an unfavorable decision, a subsequent application to this Court for writ of certiorari.

2. The issues involved in the present proceeding are of an exceptional character and of great public importance in that:

a. Absent the allowance of this remedy, petitioner will be forever barred from effective challenge of the constitutionality of the conviction entered against

him;

b. Absent the issuance of the common law writs, the State will have been allowed to bootstrap evidence insufficient to support a conviction against petitioner by the creation and use of the constitutionally impermissible statements signed by petitioner;

c. Inasmuch as petitioner's sentence under the instant conviction was enhanced under Texas law to a mandatory life sentence by a showing of two prior felony convictions, the importance of the constitutional improprieties incident to the instant conviction is greatly magnified;

d. It is inherently and historically the policy of this court, by its decisions and orders rendered, to protect and make

manifest the constitutionally preserved rights of citizens of the United States over subordinate considerations of judicial economy;

e. Left unchallenged, the judgments and orders of the District Court and the Court of Appeals impliedly support tactics which deny constitutionally protected rights and coerce confessions which may be utilized to convict an accused.

3. Petitioner's brief, as stated below:

Petitioner is in custody pursuant to a judgment of conviction and sentence in the 187th Judicial District Court of Bexar County, Texas. Petitioner was indicted in cause number 75-CR-409 for possession of a controlled substance, to-wit: heroin. The indictment alleged

prior felony convictions for forgery and passing a forged narcotics prescription and for burglary of a coin-operated machine. On a plea of "not guilty," petitioner was tried before a jury on October 8, 1975. Petitioner was found guilty as alleged in the indictment and punishment was assessed at confinement in the Texas Department of Corrections for life. Petitioner appealed his conviction to the Texas Court of Criminal Appeals where his conviction was affirmed on January 5, 1977, in cause number 53,003. Roberts v. State, 545 S.W.2d 157 (Tex. Crim. App. 1977).

Petitioner, on October 26, 1977, filed his application for writ of habeas corpus in the state trial court attacking his conviction on grounds that the trial court erred in admitting into evidence a written statement introduced by the

state to show the defendant's confession to the allegations of the indictment. Petitioner contends throughout that said statement was the product of a post-arrest police interrogation of petitioner conducted without the police officers adequately advising the petitioner of his Miranda rights, without inquiring of petitioner's desire to exercise those rights, and without securing petitioner's voluntary, knowing and intentional waiver of those rights.

Petitioner's application was forwarded by the trial court to the Texas Court of Criminal Appeals and that court denied petitioner's application without written order on April 3, 1978.

Petitioner filed his application for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division, on June 24, 1978. The District Court

denied petitioner's application without written order on March 30, 1979.

Petitioner filed an application for a certificate of probable cause in the United States District Court on April 16, 1979. Said application was refused May 4, 1979.

Petitioner filed an application for certificate of probable cause in the United States Court of Appeals for the Fifth Circuit on July 19, 1979. Said application was denied on October 1, 1979.

Petitioner contends that this petition for extraordinary writ is properly before this court according to the provisions of 28 U.S.C. § 1651(a). Petitioner further contends, and Respondent, by and through the Attorney General of the State of Texas, concedes that petitioner has exhausted his state court remedies as required by 28 U.S.C. § 2254(b), (c).

The provisions of § 1651(b) give this Court full jurisdiction to grant writs of certiorari in order to allow review of a circuit court action that declines from allowing appeal to the Circuit Court from a District Court order which denied a petition for writ of habeas corpus. Such grants of certiorari allow examination of Circuit Court exercises of discretion, and, moreover, these grants of certiorari allow this court to review the merits of the petition. House v. Mayo, 324 U.S. 42 (1945). Section 1651(a) gives this Court, in the alternative, jurisdiction to issue a writ of mandamus directing a Circuit Court to hear an appeal from a District Court's denial of application for writ of habeas corpus.

Petitioner believes his petition for writ of habeas corpus is meritorious,

and the Court of Appeals for the Fifth Circuit abused its discretion in refusing to allow his appeal from the order of the District Court denying his application for writ of habeas corpus. Petitioner files this petition to protect his rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.

Petitioner urges that in determining the voluntariness of the statement introduced at trial by the state, the trial court was obligated to evaluate the totality of the circumstances surrounding the production of the statement. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Respondent contends that Petitioner gave the statement in order to protect his wife from possible criminal prosecution. Citing United States v. Mullins,

536 F.2d 997 (2nd Cir. 1976), respondent contends that petitioner, having created the conditions which placed his wife under suspicion, is precluded from challenging the voluntariness of any statements given in hopes of obtaining his wife's release. Petitioner does not believe, however, that the allegations as cited above constitute the "totality of the circumstances." Petitioner believes that the occurrence or non-occurrence of Miranda warnings is properly part of the totality of the circumstances and creates a condition precedent which must be evaluated together with any alleged motives for giving a statement to police. Miranda v. Arizona, 384 U.S. 436 (1966).

Petitioner urges that the record does not show that the trial court examined the totality of the circum-

stances in evaluating the admissibility of the offered statement. Furthermore, the record does not support a finding that the petitioner was adequately warned of his rights or given adequate and affirmative opportunity to exercise those rights before police solicited his statements. The record does support the conclusion that the solicitation of statements was made in the context of bargaining for release of petitioner's spouse and that the voluntariness of any statements by petitioner is tainted in light of his perceived impotence with regard to his ability to exercise his right to counsel and to remain silent without penalty. Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969).

The findings of the trial court at the close of the pretrial hearing held pursuant to Jackson v. Denno, 378 U.S.

368 (1964), on petitioner's motion to suppress the written statement are, in part, as follows:

> Prior to the making of the statement by the defendant at approximately 6:10 p.m. on February 8, 1974, the defendant, while under arrest and prior to any questioning by Detective or Sergeant Curtis W. Creed of the San Antonio Police Department, the person to whom the statement was made, that the defendant was warned by Sergeant Curtis W. Creed in accordance with Article 38.22 of the Code of Criminal Procedure as follows:
>
> The defendant had the right to have a lawyer present to advise him prior to any statements or during any questioning; that if the defendant was unable to employ a lawyer,

that the defendant had a right to have a lawyer appointed to counsel with the defendant prior to and during any questioning; that the defendant had the right to remain silent and not to make any statement at all; and that the defendant was further warned that any statement made by him would be used in evidence against him at his trial; that if the defendant decided to talk to anyone, that the defendant had the right to stop talking with anyone at any time that he desired; that Sergeant Curtis W. Creed advised the defendant further that the above rights were continuing rights which could be urged by the defendant at any stage of the interrogation, and the defendant affirmatively and voluntarily

waived these rights.

The Court further finds from all the evidence that the defendant was not induced or caused by any person to give or make any confession by any threats, persuasion, compulsion, intimidation, violence, promise or anything else, other than by a free and voluntary act of the defendant; and that such confession was typed in response to voluntary statements made by the defendant to Sergeant Curtis W. Creed; and that the defendant did knowingly, intentionally and voluntarily waive his rights as above informed by Sergeant Curtis W. Creed; and that the defendant freely and voluntarily signed his name thereto.

The Court concludes as a matter of law that the statement was by the defendant made freely, voluntarily and without compulsion, persuasion, threats, assault or battery or any promises or any combination thereof or any conduct or threats on the part of any person either at or before the making and signing of the statement.

The Court further concludes as a matter of law that such statement was voluntarily given in accordance with all the requirements of the Constitution of the United States of America and the Constitution and the statutes of the State of Texas, and particularly in accordance with the rules of criminal procedure of the State of Texas, to-wit: Article 38.22 of the Code of Criminal Procedure.

> Accordingly, the defense motion to suppress the written confession is overruled and denied.

The trial court's findings are not supported in the trial record. Detective Creed testified at the pretrial hearing and at trial that he first warned the petitioner at the scene of the arrest. SF 71, 85. The record shows that Detective Creed testified that he read a warning of undisclosed form from "a card issued by the San Antonio Police Department." SF. 71. This card was never introduced into evidence and the trial court made no formal notice of the form or content of the said card. Likewise, the trial court made no findings regarding the adequacy of that warning against the Miranda criteria.

Furthermore, the record supports

petitioner's contention that if such card was read to petitioner by Detective Creed at the scene, it was read at such time and under such circumstances as to render the effectiveness of the recitation of such warnings of less than "clarion and firm" quality. Lathers v. United States, 396 F.2d 524 (5th Cir. 1968). The record reflects that the contents of the card were read to petitioner when he was removed from his car by Detective Creed. Petitioner and his wife were at that time in the midst of a rush-hour traffic intersection with much commotion, noise and confusion, such that petitioner could not at that time exercise his right to call an attorney. SF. 85. The testimony of Detective Saucedo supports the belief that the contents of the card were read to petitioner in the middle of the street and

not in the relatively more calm setting at the nearby gas station parking lot. SF. 335.

The record does not support a finding that the Petitioner was given a proper warning prior to his interrogation. The record further shows that the warning given Petitioner occurred after he had been interrogated by the police and at such time that Petitioner allegedly had already agreed to waive his rights as reflected in the phrasing of the warning itself. (SF 155). This fact contradicts the impression the prosecution attempted to plant in the minds of the jury and the court of there being two valid warnings -- one at the scene, the other at the police station -- read to Petitioner from a single piece of paper and of a single form. (SF 153).

The record supports a finding that

Detective Creed, for the police, did conduct an in-depth interrogation of Petitioner at the police station subsequent to the invalid on-the-scene warning without first adequately apprising Petitioner of his right to counsel and without first inquiring of Petitioner's desire to exercise or knowingly and intentionally to waive those rights. (SF 157).

In that statements were elicited from the Petitioner subsequent to an invalid warning and without prior recitation of a valid and curative warning, such statements were inadmissable as evidence at Petitioner's trial. Lathers v. U.S., supra; Gilpin v. U.S., supra; Miranda v. Arizona, supra.

Petitioner recognizes that this Court, on consideration of applications for writ, will review the record in the

light most favorable to the prosecution. Glasser v. U.S., 315 U.S. 60 (1942). Still, this Court requires that, to support a conviction based on the evidentiary confession of the defendant, the record must clearly show that the prosecution affirmatively satisfied the burden of showing the voluntariness of the confession. Miranda v. Arizona, supra.

The record nowhere shows what form of warning Petitioner was given at the scene of his arrest. Likewise, the record fails to show whether Petitioner understood his rights nor does it show that he was given any opportunity to exercise his rights. Examination of the totality of the circumstances reveals that Petitioner's perceived impotence regarding the rights available to himself and his wife was the basis of his attempts to use his statements as a

bargaining device. This perceived impotence resulted from police failure to fully apprise Petitioner of his available rights and of the failure to allow him adequate opportunity to exercise those rights.

Examination of this "totality of circumstances" accentuates the unreliability of the state-offered statement and exposes a tainted fact-finding process. U.S. vs. Charlton, 565 F.2d 86 (6th Cir. 1977).

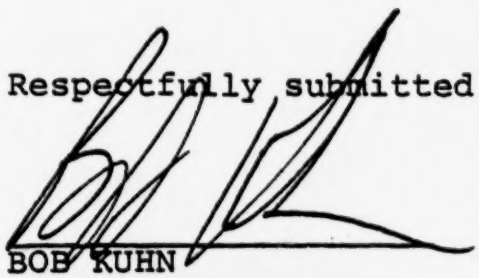
Petitioner further contends that use of the inadmissable confession was not harmless error. Chapman v. California, 386 U.S. 18 (1967). Petitioner believes the record cannot support a finding of Petitioner's guilt beyond a reasonable doubt absent the introduction of the written statements.

VI. CONCLUSION

WHEREFORE, Petitioner prays that this Court issue a common law writ of certiorari to the Court of Appeals for the Fifth Circuit, to review the order of that Court, entered on October 1, 1979, dismissing petitioner's appeals, or that this Court issue a writ of mandamus to said Court, directing it to entertain and decide petitioner's appeal filed therein.

Petitioner further prays that this Court grant petitioner such other and further relief as it may deem to be just and equitable.

Respectfully submitted,



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APPENDIX A

TABLE OF AUTHORITIES

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APPENDIX B

ORDERS BELOW

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-8390

MORGAN A. ROBERTS,

Petitioner

VS.

W. J. ESTELLE, JR., Director
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

APPLICATION FOR CERTIFICATE OF
PROBABLE CAUSE AND FOR LEAVE
TO APPEAL IN FORMA PAUPERIS

ORDER

IT IS ORDERED that petitioner's application for certificate of probable cause and for leave to appeal in forma pauperis is denied.

FILED: 10/1/79

ENTERED FOR THE COURT:

BY: Carolyn Denise Randall
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NO. SA 78 CA 230

MORGAN A. ROBERTS,

Petitioner

VS.

W. J. ESTELLE, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ORDER

On this the 3rd day of May, 1979, came on to be considered the Request for Certificate of Probable Cause filed by the Petitioner, by and through his attorney, Bob Kuhn, Esquire, (Kuhn, Collins and Alexander, 507 W. 10th Street, Austin, Texas 78701) in the above styled and numbered cause.

After having reviewed the record and the file of the case, the Court is of the opinion and so finds and certifies that any appeal from this Court's Order

of March 30, 1979, would be frivolous and wholly without merit and would not be taken in good faith.

It is, therefore, ORDERED, ADJUDGED and DECREED that Petitioner's Request for Certificate of Probable Cause be and the same is hereby, in all things DENIED.

SIGNED and ENTERED this the 4th day of May, 1979.

ENTERED FOR THE COURT:

By: John H. Wood, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NO. SA 78 CA 230

MORGAN A. ROBERTS,

Petitioner

VS.

W. J. ESTELLE, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ORDER

On this day came on to be considered the Findings and Recommendations of the United States Magistrate in the above-entitled and numbered cause, together with the pleadings of the parties, the instruments on file herein, and any objections of the parties, and the Court having examined the same is of the opinion and finds that the Magistrate's Report is correct and should be approved. It is accordingly,

ORDERED that the Report and Recommendations of the United States Magistrate

be, and the same is hereby, adopted in all things, and the Motion of the petitioner is hereby DENIED.

SIGNED and ENTERED this the 30th day of March, 1979.

ENTERED FOR THE COURT:

BY: John H. Wood, Jr.
United States District Judge

COURT OF CRIMINAL APPEALS
STATE OF TEXAS

APPLICATION NO. 3366

MORGAN A. ROBERTS,

Petitioner

VS.

W. J. ESTELLE, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

DATED: April 5, 1978

APPENDIX C

EXCERPTS FROM STATEMENT OF FACTS

STATEMENT OF FACTS (Excerpted in Pertinent Part) pagenated as per the actual transcript.

SF p. 71
Hearing on Defendant's Motion to Suppress Evidence (Testimony of Sgt. Creed, by Mr. Ryman)

A Yes, sir.

Q And who did you arrest?

A Marvin A. -- excuse me; I'll get it right in a minute -- Robert Morgan or Morgan A. Roberts.

Q All right, and did you yourself read Mr. Roberts his rights there at the scene?

A Yes, sir, I did.

Q Is Morgan A. Roberts present here in the Courtroom at this time?

A Yes, sir. He's sitting behind this gentleman right here. (indicating)

MR. RYMAN: All right, Your Honor, may the record reflect that

this witness has pointed to the Defendant in this cause?

THE COURT: All right.

BY MR. RYMAN:

Q And what rights did you read to him at that time?

A The rights contained on the card issued by the San Antonio Police Department.

Q All right, sir, and as a result of this arrest, did you yourself see where the alleged contraband was found in the car?

A Not the exact position, no, sir. Detective Saucedo recovered it from the car, and I saw him bring the package out of the car. But I don't know where he obtained . . .

.

SF p. 86
Hearing on Motion to Suppress (con't), (Testimony of Sgt. Creed by Mr. Kuhn)

Q All right, at that time you had not seen any contraband of any kind or found any yourself, had you?

A No, sir, I had not.

Q Now, about this statement, Sergeant Creed. How long did you discuss this matter with Morgan Roberts before you started getting out a form and typing it up?

A I don't know in minutes how long it would be; as long as it would take you and I to sit and talk about what actually happened.

Q Did you discuss with him why he ought to give a statement to you?

A Not really. He wanted to give a statement, he said. We had him and his wife both down there, and they were both in the car. And we had them both down in the narcotics office and were preparing to put both of them in jail. And he said

his wife didn't have anything to do with this incident.

Q And so then at that point you said, "Tell me about what happened," or something to that effect?

A He laid it out to me.

Q And you then, after you listened to what he had to say, you told him if he would give you this statement in writing, that that would clear his wife and that you would release her?

SF p. 153
Trial on the Merits (Testimony of Sgt. Creed by Mr. Ryman)

procedures did you follow?

A We went to the Enco lot where a further search of the car was made as well as the car that was driven by De La O. And we returned the subjects and Tony De La O to the police station to the narcotics

office.

Q All right. Now, when you returned to the narcotics office, did you have a conversation with the Defendant?

A Yes, sir, I did.

Q All right, and as a result of that conversation what procedure did you follow?

A He was booked in the City Jail for possession of heroin.

Q All right. Now, before he was booked in the City Jail for possession of heroin, did you warn him of his rights at any time?

A Yes, sir, I did.

Q Where did this take place?

A First out at the scene, and then again in the narcotics office.

Q All right, did you read these warnings to him from a particular piece of paper?

A Yes, sir.

Q And would you -- I refer you to -- excuse me.

MR. RYMAN: Would you mark this as State's Exhibit 4, please?

SF p. 155
Trial on the Merits (con't), (Testimony of Sgt. Creed by Mr. Ryman)

A Yes, sir.

Q Would you read the same warnings that you read to the Defendant back on the 8th of February, 1974?

A "I have the right to have the lawyer present to advise me either prior to any questioning or during any questioning; and that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to counsel with me prior to or during any questioning; and that I have the right to remain silent and not make any statement at all; and

further, that any statement I make may be used in evidence against me at my trial; that if I decide to talk to anyone, I can, and that I can stop talking to them at any time I want; the above rights are continuing rights which can be urged by me at any stage of the proceedings, and I do hereby voluntarily waive these rights and give to the said Sergeant Curtis W. Creed" -- and he gave me this statement. (indicating)

Q All right.

MR. KUHN: Your Honor, I object to that statement that, "he gave me that statement," for the reasons as set out before. And again I request that I be allowed to take this witness on voir dire.

THE COURT: Overruled.

MR, KUHN: Note my exception.

BY MR. RYMAN:

SF p. 157
Trial on the Merits (Testimony of Sgt. Creed by Mr. Ryman)

THE COURT: Sustained; don't lead your witness.

BY MR. RYMAN:

Q Approximately what time of the day was it that you read the Defendant his rights there at the narcotics bureau of the San Antonio Police Department?

A At about ten after six in the evening.

Q Did you mark that in the statement?

A Yes, sir, I did.

Q All right. Now, what method did you use to take the statement from the Defendant?

A Well, he and I were sitting in the narcotics office. And he had pretty well told me what happened --

MR. KUHN: Your Honor, would

you prefer me to continue to object, or will you give me a running objection to all of this?

THE COURT: You may continue to object at any time you feel it is necessary.

MR. KUHN: All right, I object to that statement saying that the Defendant told him anything.

THE COURT: Well, I'll sustain that at this time.

BY MR. RYMAN:

Q Now, after you talked with the Defendant and read him his rights, what method or how did you go about taking the statement from him?

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I believe his wife was on the passenger side. I approached the

passenger side and Sergeant Creed approached the driver's side.

Sergeant Creed, I believe, advised him that they had information or we had information that they were in possession of heroin and to consider themselves under arrest.

I got Paula Roberts out and I handcuffed her. And I placed her in the back seat of their car.

Q All right, what did you do next?

A Sergeant Creed got Morgan Roberts out of the car, patted him down and was talking to him.

Q All right, then what happened?

A Detective Dotson was in another car. He went up to the car that Tony De La O was driving, which was about two or three carlengths in front. He got him out of the car

and brought him back to Sergeant Creed.

Q All right, what happened next?

A Okay, Sergeant Creed took Tony De La O back to his car. Morgan Roberts got back in his car by Sergeant Creed, advising him to get back in the car.

Q On the driver's side?

A Yes, sir, on the driver's side.

Q All right, what occurred next?

PROOF OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion For Leave To File Petition and Petition For Common Law Writ of Certiorari or For Writ of Mandamus has been sent certified mail, return receipt requested, to Ms. Carolyn Denise Randall, United States Circuit Judge for the Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, LA, 70130; and to Mr. Ted Butler, Criminal District Attorney, Bexar County, Texas, 305 Bexar County Courthouse, San Antonio, Texas, 78205, on this the 10 day of April, 1980.

BOB KUHN